Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JAYSON SEPE,
Petitioner,

v.

MCDONNELL DOUGLAS CORP.,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Family and Medical Leave Act of 1993, 29 U.S.C.§ 2601 *et seq.* (FMLA) provides eligible employees may take a leave of absence from their employment for purposes specified in the act including the birth of a child. 29 U.S.C. § 2612(a)(1)(A). The questions presented are:

1. Did the Eighth Circuit Court of Appeals properly follow guidelines set out by this Court in the case of *McDonnell Douglas Corporation v. Percy Green*, 411 U.S. 792 (1973) when it affirmed the district court's grant of summary judgment for defendant on Sepe's claim for retaliatory termination?
2. Did Appellant, Jayson Sepe, establish a prima facie claim for retaliatory discharge under the Family and Medical Leave Act of 1993, 29 U.S.C.§ 2601 *et seq.* (FMLA), against his employer, McDonnell Corporation (MCD) after he was terminated upon his return from leave for allegedly violating the terms of a Collective Bargaining Agreement between his union and his employer?

LIST OF PARTIES

All parties are listed on the cover. Petitioner was plaintiff and appellant below. Respondent was defendant and respondent below.

RULE 29.6 LIST

There is no parent company nor non-wholly owned subsidiary of petitioner.

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (App., infra A-1) is reported at 176 F.3d 1113 (8th Cir. 1999). The opinion of the District Court for the Eastern District of Missouri (App., infra C-7) is a decision without published opinion.

JURISDICTION

This action was brought under the Family and Medical Leave Act of 1993, 29 U.S.C.§ 2601 *et seq.* (FMLA). Jurisdiction in the District Court for the Eastern District of Missouri was based on 29 U.S.C.§ 2617(a)(2). The District Court entered its judgment on April 29, 1998. The Eighth Circuit Court of Appeals affirmed on June 7, 1999 and denied a timely motion for rehearing on July 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

STATUTORY PROVISION INVOLVED

1. The Family and Medical Leave Act of 1993, 29 U.S.C.§ 2601 *et seq.* generally and in particular the definition of an eligible employee under Title I-General Requirements for Leave 29 U.S.C.§ 2611(2)(A)(ii):

   2 Eligible Employee.-

   (A) In General-The term "eligible employee" means an employee who has been employed -

   (i)...

   (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

2. The Department of Labor Regulation 29 C.F.R.§ 825.110(d):

   If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is

to commence, the employee will be deemed eligible. The employer may not, then deny the leave. (Excerpt only- See appendix D for full text of Section).

STATEMENT OF THE CASE

Appellant, Jayson Sepe, began his employment with McDonnell Douglas Corporation (MCD) in 1984 and worked there continuously except for a one year lay-off in 1991. In May of 1995, Sepe timely requested a leave of absence in anticipation of his wife giving birth to their child. His request was approved by the manager of employee records on a company form which showed the leave was for the birth and care of a newborn child and contained Family and Medical Leave instructions on the back. Sepe's wife gave birth to their daughter, Caroline, on May 7, 1995 and Sepe began his twelve week, non-paid leave the following day. While Sepe was on leave, an investigation was mobilized by MCD security personnel to determine if Sepe was working in contravention of a Collective Bargaining Agreement provision between Sepe's union and MCD. As a result of the investigation, Sepe was suspended without pay upon his return from leave on July 31, 1995. He was formally terminated in August of 1995. Sepe filed a union grievance which was denied at the initial hearing. He then obtained a lawyer and filed suit in the Federal District Court for the Eastern District of Missouri. The district court granted MCD's motion for summary judgment and Sepe appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals affirmed the judgment of the district court on June 7, 1999. The court's order denying rehearing was entered on July 12, 1999.

REASONS FOR GRANTING THE PETITION

This retaliatory discharge case was brought under the Family and Medical Leave Act of 1993, 29 U.S.C.§ 2601 *et seq.* (FMLA). This Court should grant this petition because the Eighth Circuit Court of Appeals failed to determine plaintiff made a prima facie case under *McDonnell Douglas Corporation v. Percy Green*, 411 U.S. 792 (1973), for two reasons. The first reason is the court failed to follow a Department of Labor Regulation found at 29 C.F.R.§ 825.110(d). (App., A-18). Application of this regulation would have resulted in Sepe establishing the first of three prongs of his prima facie case. This regulation has been inconsistently applied by the courts in different circuits as discussed below. The second reason is the Eighth Circuit Court of Appeals did not follow the framework established by this court in reviewing retaliatory discharge cases set out in the *McDonnell* case cited above.

A retaliatory discharge claim under the FMLA has not been addressed by this Court, however, other courts have applied the burden shifting analysis established by *McDonnell Douglas Corporation v. Percy Green*, 411 U.S. 792 (1973). See, e.g., *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160 (1st Cir. 1998); *Richmond v. Oneok, Inc.*, 120 F.3d 205, 208- 9 (10st Cir. 1997); and *Oswalt v. Sara Lee Corp.*, 889 F.Supp. 253, 259 (N.D. Miss. 1995), *aff'd*, 74 F.3d 91 (5th Cir. 1996). To establish a prima facie case of retaliatory discharge the complainant must establish the following elements: (1) He is an employee protected under the FMLA; (2) He suffered an adverse employment decision; and (3) a causal connection existed between his activity and the adverse action. *Beno v. United Telephone Company of Florida*, 969 F.Supp. 723, 724 (M.D. Fla.1997). The second element requiring an adverse employment decision is not disputed. The Eighth Circuit Court of Appeals confined its decision to the first element. Namely, whether Sepe was eligible to take a family leave and thereby protected under the FMLA.

The threshold requirement of a prima facie claim for retaliatory discharge under the framework established by *McDonnell* requires finding plaintiff is entitled to the protection of the FMLA. *Archuleta v. Colorado Dept. Of Institutions*, 936 F.2d 483, 486 (10th Cir. 1991). The FMLA requires employees work 1250 hours during the year preceding their family leave to be eligible. 29 U.S.C.§ 2611(2)(A)(ii).

The Eighth Circuit Court of Appeals decided Sepe was not eigible because the act requires 1250 hours worked in the twelve month period preceding the leave. 29 U.S.C.§ 2601. The facts show Sepe worked only 822 hours. However, the FMLA empowered the Secretary of Labor to promulgate regulations as "are necessary to carry out" the FMLA. 29 U.S.C.§ 2654. *Wolke v. Dreadnought Marine, Inc.*, 954 F.Supp. 1133, 1134 (E.D.Va. 1997). The regulations are found in Volume 29 of the Code of Federal Regulations. 29 C.F.R. § 825.110(d), (App., A- 18). The regulation in question provides: "If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then deny the leave." § 825.110(d). The Department of Labor regulation cited above requires the eligibility determination must be made before the employee's leave commences otherwise the employer is estopped from later asserting the employee was ineligible. § 825.110(d) *supra*. The facts in this case show the leave was properly requested by Sepe and granted by MCD. MCD's assertion of Sepe's ineligibility never arose until after suit was filed in the district court. By operation of that regulation, Sepe established the first element, that he was eligible for FMLA leave and entitled to the protection of the act.

The Eighth Circuit Court of Appeals declined to address the validity of the regulation, instead holding MCD's proffered reason for firing Sepe was true. After avoiding its duty to address the validity of this regulation, the Eighth Circuit failed to follow

the established procedure for reviewing retaliatory discharge cases by skipping over its analysis of Sepe's prima facie showing. The court found MCD's proffered reason for discharging Sepe to be true. Whether MCD's reason was true or pretext is a disputed material fact which should be resolved by the trier of fact. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 503 (1993).

In holding Sepe was terminated for violating a Collective Bargaining Agreement (CBA), the Eighth Circuit Court of Appeals failed to analyze Sepe's claim of retaliatory discharge following his FMLA leave under the burden shifting analysis established by this Court in the case of *McDonnell Douglas Corporation v. Percy Green*, 411 U.S. 792 (1973). The issue for the District Court for the Eastern District of Missouri and the Eighth Circuit Court of Appeals to decide in its de novo review of the district court's grant of MCD's summary judgment motion pursuant to F.RC.P. 56(c), was whether Appellant, Jayson Sepe, established a prima facie claim for retaliatory discharge under the FMLA. If plaintiff satisfies the elements above and therefore makes a prima facie case, only then does the burden shift to the employer to articulate a legitimate reason for the employee's termination. *McDonnell Douglas*, at 803. It is at this point that the Eighth Circuit's analysis failed. MCD offered as a reason for terminating Sepe the fact that he violated a (CBA) provision. This showing merely discharged MCD's burden to meet plaintiff's prima facie case. However, the inquiry does not end there. *McDonnell Douglas* at 804. When a prima facie case is established it gives rise to a presumption the firing is unlawful. When evidence is advanced showing the action taken was for a legitimate, non-discriminatory reason, this would support a finding that MCD's firing was not retaliatory, "*if believed by the trier of fact,...*". *St. Mary's Honor Center supra* at 503. (Emphasis added). The District Court and the Eighth Circuit merely took the employer's reason at face value and found the factual issue

in favor of MCD. What the Eighth Circuit failed to acknowledge was that the burden shifting inquiry, once met by both sides, disappears from consideration. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). "The Plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision.'" *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), citing *Burdine*, 450 U.S. at 256. As stated by this Court, "In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment. For the burden-of-production determination necessarily *precedes* the credibility-assessment stage." *St. Mary's Honor Center v. Hicks*, at 502. (emphasis in original). The result to Sepe is, though he arguably established a prima facie case of retaliatory discharge against MCD, he has been denied the opportunity to show MCD's stated reason for terminating him was pretextual.[1]

[1]The Eighth Circuit did not address the third element of a prima facie case which requires finding a causal connection between the protected activity and the adverse action. The causal element has been found in factual circumstances similar to Sepe's. In the case of *Hodgens v. General Dynamics Corp.*, 144 F3d 151 (1st Cir. 1998), the court found the complainant had established causation where the evidence showed Hodgens had been warned by his supervisor that he was taking "too much time off" and advised him to "make every effort to have [his] absenteeism fall within company guidelines." His performance reviews and ranking diminished because of his absences. The court also found "close temporal proximity between two events" can give rise to an inference of causal connection. *Hodgens*, at 168. The court gave the example of protected conduct closely followed by adverse action. These criteria apply to Sepe. He was warned by his foreman before taking the family leave to be careful about working while on leave. His performance review, once excellent to outstanding, recently showed problems with punctuality and absenteeism. The "close temporal proximity" test of causation was met as Sepe was suspended immediately on his return from leave and formally terminated soon thereafter

This case should be remanded to the District Court for the Eastern District of Missouri for a proper analysis of Sepe's prima facie claim under the framework established in *McDonnell*, supra. The issues in the case brought under this new statute have immense importance to the millions of workers interested in taking family leaves for the birth of children as well as leaves for their own or family member's serious medical conditions. There is no guidance available for employers nor employees in determining questions of eligibility for FMLA leaves. The uncertainty leaves open the possibility an employer can grant a leave under the FMLA and later deny the employee's eligibility at any time. That precise situation has occurred in the instant case.

Additionally, this Court needs to rectify the situation brought about by the uncertainty of the Department of Labor Regulation found in 29 C.F.R.§ 825.110(d). Some district courts have held the regulation to be invalid: e.g. *Wolke v. Dreadnought Marine, Inc.*, 954 F.Supp. 1133 (E.D.Va. 1997). Curiously, the regulation was cited with authority in the same district, albeit a different division, as the *Wolke* case. *Barron v. Runyon*, 11 F. Supp. 2d 676, 677 (E.D.Va. 1998). Nevertheless, the CFR in question remains identical today as it did when it first became effective. *See* 825.110(d) (7-1-95 Edition) and 825.110(d) (7-1-98 Edition). (App. A-18).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2490

Jayson Sepe,
Appellant,
v.
McDonnell Douglas Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 15, 1999
Filed: June 7, 1999

Before RICHARD S. ARNOLD and WOLLMAN,[1] Circuit Judges, and TUNHEIM,[2] District Judge.

WOLLMAN, Chief Judge.

Jayson Sepe appeals the district court's[3] adverse grant of summary judgment on his claim under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654, against his former employer, McDonnell Douglas Corporation. We affirm.

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[1]Roger L. Wollman became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 24, 1999.

[2]The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

[3]The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

I.

Sepe was hired by McDonnell Douglas in 1984 as a sheet metal riveter and was later promoted to the position of builder. Both positions were union positions, and Sepe was a member of the International Association of Machinists and Aerospace Workers, District Lodge 837. Sepe was continuously employed by McDonnell Douglas until his termination in August, 1995, except for a one year period in 1991, when he was temporarily laid off as a result of a reduction in force.

During his lay-off in 1991, Sepe and his wife started an excavating business call J&K Excavating and Bobcat Services (J&K). Sepe's wife was the president of the business and handled the day-to day affairs. Sepe assisted her when he was not working at McDonnell Douglas.

McDonnell Douglas did not prohibit its employees from working a second job, and Sepe's supervisors knew of his work at J&K. McDonnell Douglas did, however, prohibit its employees from working on another job while on leave from the company. McDonnell Douglas's general operating procedures state:

> Employees accepting other employment or engaging in self-employment while on authorized leave of absence will be terminated by the Company unless written authorization has been granted by the Manager-Employee Records prior to commencement of the [leave of absence].

Appellee's Appx. at 21. In addition, the collective bargaining agreement (CBA), which applies to all union employees, prohibit Sepe from engaging in other employment while on leave from McDonnell Douglas. Specifically, Article VII, Section 7 of the CBA provides:

> An employee accepting other employment or engaged in business for himself while on leave of absence shall be

> discharged by the Company unless the Union and the Company have jointly, prior to the commencement of such leave of absence, agreed in writing that it could be done.

Appellee's Appx. at 17-18.

In May 1995, Sepe requested and was granted a twelve-week leave of absence from McDonnell Douglas in connection with the birth of his daughter. Sepe had taken medical leave from June 14, 1994, to December 19, 1994, and from March 13, 1995, to March 27, 1995. As a result, Sepe had worked only 822 hours during the previous twelve months.

McDonnell Douglas officials received notice in May 1995 that Sepe was working at J&K while on leave. A McDonnell Douglas investigation team subsequently videotaped Sepe working at J&K during his normally scheduled hours at McDonnell Douglas. When Sepe returned to work in August 1995, he was terminated for violating the terms and conditions of the CBA.

Sepe filed this action against McDonnell Douglas, alleging a violation of his rights under the FMLA. The district court found that Sepe was not an "eligible" employee for purposes of the FMLA because he had not worked the minimum number of hours required by the statute. The district court also found that Sepe was fired for violating the terms of the CBA and not in retaliation for exercising his rights under the FMLA.

II.

We will affirm a grant of summary judgment if the evidence, viewed in the light most favorable to the nonmoving party, establishes that no genuine question of material fact exists and that the moving party is entitled to judgment as a matter of law. *See Montandon v. Farmland Indus., Inc.*, 116 F. 3d 355, 357 (8th Cir. 1997); *Bashara v. Black Hills Corp.*, 26 F. 3d, 820, 823 (8th Cir. 1994); *see also* Fed. R. Civ. P. 56.

The FMLA grants eligible employees up to twelve weeks of leave during any twelve-month period for enumerated circumstances, including "the birth of a son or daughter of the employee." 29 U.S.C. § 2612 (a)(1)(A). *See Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210, 1213 (8th Cir. 1998) (discussing the FMLA). An eligible employee is one who has been employed "for at least 12 months by the employer" and provided "at least 1250 hours of service during the previous 12-month period." 29 U.S.C. §2611 (2)(A)(i)-(ii). Because Sepe worked only 822 hours during the year preceding his request for leave, he does not qualify as an "eligible employee" and therefore is not entitled to FMLA protection.

Despite Sepe's ineligibility under the statute, he argues that McDonnell Douglas is estopped from challenging his eligibility by operation of 29 C.F.R. § 825.110(d), which states:

> If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility.

29 C.F.R. § 825.110(d). Sepe argues that McDonnell Douglas is estopped from challenging his eligibility because it approved his request for leave and subsequently failed to notify him of his ineligibility under the FMLA.

We need not grapple with the question whether the regulation in question grants rights greater than those conferred by the FMLA, for we agree with the district court that Sepe was fired because he had violated the terms of the CBA and not in retaliation for having exercised any rights under the FMLA.

Sepe does not dispute that he engaged in "other employment" by working at J&K while on leave. Thus, McDonnell Douglas was within its rights - - indeed, was required to under the terms of the CBA - - to fire Sepe after he engaged in such employment without written permission to do so.

The judgment is affirmed.

A true copy,

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2490EMSL

Jayson Sepe,
Appellant,
v.
McDonnell Douglas Corporation,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

The petition for rehearing filed by the appellant has been considered by the court and is denied.

(5193-010199)

July 12, 1999

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Court

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:97CV470-DJS

Jayson Sepe,
Plaintiff,
v.
McDonnell Douglas Corporation,
Defendant.

ORDER

On March 18, 1997, plaintiff filed the instant complaint against defendant, his former employer. Plaintiff alleges that defendant terminated his employment in violation of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §2601, *et seq.* This matter is now before the Court on defendant's motion for a summary judgment.

I. Undisputed Facts

Plaintiff commenced his employment with defendant on April 17, 1984 as a sheet metal assembly riveter, and was later promoted to the position of builder, mock up and tooling. Both jobs are union positions and plaintiff was a member of the International Association of Machinists and Aerospace Workers, District Lodge 837. Plaintiff has been continuously employed by defendant since 1984 except while laid off for approximately one year beginning in 1991. Plaintiff's wife, Karen Sepe, started a business called J&K Excavating and Bobcat Services (hereinafter "J&K") during plaintiff's lay off. Both plaintiff and his wife were obligated on a $10,000 note, the

proceeds of which were used to start the business. While working for defendant, plaintiff assisted his wife in the operation of the business.

In May of 1995, plaintiff requested and took a twelve-week leave of absence in connection with the birth of his daughter. In the year preceding the requested leave, plaintiff had taken medical leave from June 14, 1994 to December 19, 1994 and from March 13, 1995 to March 27, 1995. Accordingly, plaintiff had only worked 822 hours in the year preceding his leave of absence for the birth of his daughter.

Plaintiff's union's collective bargaining agreement ("CBA") with defendant provides in relevant part:

> An employee accepting other employment or engaged in business for himself while on leave of absence shall be discharged by the Company unless the Union and the Company have jointly, prior to the commencement of such leave of absence, agreed in writing that it could be done...

Deft's Mtn. for Summary Judgment, Exh. B, Collective Bargaining Agreement, Art. VII, §7. Moreover, defendant's General Operating Procedure provides:

> Employees accepting other employment or engaging in self-employment while on authorized leave of absence are terminated by the Company unless written authorization has been granted by the Manager of Employee Records prior to commencement of the LOA.

Id., Exh. C, General Operating Procedures, 3, ¶3. Plaintiff admits that he worked for J&K during all three of his aforementioned leave periods. During plaintiff's March 1995 leave, one of plaintiff's supervisors, Ted Moody, was informed that plaintiff was working during his leave. Because that leave period was only two weeks in duration, there was inadequate time for defendant's security department to act on Moody's request for

investigation of this allegation. Later, during plaintiff's twelve-week leave period, Moody requested an investigation. Surveillance conducted by the security department revealed that plaintiff had been operating excavating equipment during his normally scheduled work hours. Moreover, plaintiff admitted that he worked for J&K during the leave period. Plaintiff contends that he did equal amounts of parenting and assisting his wife with J&K during his twelve-week leave. Defendant terminated plaintiff's employment on August 8, 1995, citing plaintiff's violation of Article VII, Section 7 of the CBA.

II. Summary Judgment Standard

This Court must grant summary judgment if, based upon the pleadings, admissions, depositions, and affidavits, there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.56 (c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The moving party must initially demonstrate the absence of an issue for trial. *Id.* at 323. Any doubt as to the existence of a material fact must be resolved in favor of the party opposing the motion. "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Nevertheless, once a motion is properly made and supported, the nonmoving party may not rest upon the allegations in its pleadings but must instead set forth specific facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56 (e). Summary judgment must be granted to the movant if, after adequate time for discovery, the nonmoving party fails to produce any proof to establish an element essential to the party's case and upon which it bears the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 322-24. For "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. A

party opposing summary judgment cannot resist a properly made motion by reference only to its pleadings. *Id.* at 324, 325. "Rule 56 (e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56 (c), except the mere pleadings themselves." *Id.* at 324.

III. Discussion

The FMLA allows eligible employees up to twelve weeks of leave during any twelve month period for enumerated reasons including "the birth of a son or daughter of the employee and in order to care for such son or daughter." 29 U.S.C. § 2612 (a)(1)(A). "To be eligible, the employee must have at least 1250 'hours of service' during the twelve months prior to commencement of leave." *Moore v. Payless Shoe Source, Inc.,* 1998 WL138851, at *3 (8th Cir. March 30, 1998), *citing 29* U.S.C. § 2611 (2)(A).

In the instant action , there is a dispute as to whether plaintiff is an "eligible employee" for purposes of the FMLA. Defendant argues that because plaintiff did not work 1250 hours in the twelve months preceding the requested leave, he is not protected under the FMLA, even though he did qualify for leave under defendant's policy. In opposition, plaintiff argues that defendant should be estopped from arguing that he is not an "eligible employee" because defendant granted his request for leave which specifically mentioned the FMLA. A Department of Labor regulation provides:

> If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for

> leave is received, the employer may not subsequently challenge the employee's eligibility.

29 C.F.R. § 825.110(d). At least two courts have found this regulation to be invalid because it is contrary to the clear language in the FMLA setting forth requirements for employee eligibility. *See Seaman v. Downtown Partnership of Baltimore, Inc.*, No. CCB-97-3193, 1998 WL 30237 at *7 (D. Maryland Jan. 20, 1998), *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Wolke v. Dreadnought Marine, Inc.* 954 F. Supp. 1133, 1137 (E.D. Va. 1997). However, the *Wolke* court did not foreclose the possibility that an employer could be estopped from contesting an employee's eligibility under the statute where the employee had detrimentally relied on an erroneous belief that he or she was eligible. *Wolke*, 954 F. Supp. at 1137. Plaintiff has cited the *Wolke* case to support his estoppel claim. The Court finds that plaintiff has failed to demonstrate any detrimental reliance which would support a finding of estoppel in this case. Plaintiff received the leave that he requested, even though he was not eligible under the FMLA. Plaintiff's claims of retaliatory discharge do not support a finding of detrimental reliance on his eligibility under the Act. Accordingly, the Court finds plaintiff's estoppel argument to be without merit, and because plaintiff worked only 822 hours in the twelve-month period preceding his leave, he was not an eligible employee for purposes of the FMLA. *See* 29 U.S.C. § 2611 (2)(A).

In the alternative, the Court will address plaintiff's claim as though he were an eligible employee under the FMLA. There are differing views as to what constitutes a prima facie case for purposes of the FMLA. Many courts have applied for the burden-shifting analytical framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See, e.g., Richmond v. Oneok, Inc., 120 F. 3d 205, 208, (10th Cir. 1997); Morgan v. Hilti, Inc., 108 F. 3d 1319, 1322 (10th Cir. 1997).

However, In *Diaz v. Fort Wayne Foundry Corp.*, 131 F. 3d 711, 712-13 (7th Cir. 1997), the Seventh Circuit Court of Appeals recently held that substantive claims under the FMLA are not properly analyzed under the *McDonnell Douglas* framework. The *Diaz* court applied a direct analysis of whether the employee in question was wrongfully denied benefits guaranteed by the statute. *Id.* at 713. The *Diaz* court noted:

> At least one court of appeals has used a derivative burden-shifting approach for claims based on the anti-retaliation provision of the FMLA . . . and we reserve judgment on this possibility. (It is not clear what a burden-shifting approach could add, but at least it would not misdirect attention, as it does for substantive claims.)

Id. The Court finds that defendant is entitled to judgment as a matter of law under either the direct approach applied in *Diaz* or under the *McDonnell Douglas* burden-shifting analysis.

Several courts have identified the prima facie case for a claim of FMLA retaliation as requiring plaintiff to show: (1) he engaged in activity protected under the FMLA; (2) he subsequently suffered adverse action by the employer; and (3) a causal connection existed between the employee's activity and the adverse action. *See Richmond*, 120 F. 3d at 208; *Hillman v. Hamilton College*, 1998 WL 166827, at *6 (N.D.N.Y. April 9, 1998). Defendant argues that plaintiff has failed to establish a prima facie case for retaliation. First, defendant contends that because plaintiff does not qualify as an eligible employee for purposes of the Act, that he did not engage in protected activity. As discussed above, the Court finds that plaintiff was not an eligible employee. Therefore, plaintiff did not engage in protected activity under the FMLA, and thus plaintiff fails to properly assert a prima facie case. In the alternative, even if the Court were to find that plaintiff had engaged in protected activity under the FMLA, his claim fails on the causal connection

element.

Defendant argues that plaintiff cannot establish the requisite causal connection between his protected activity and the adverse employment action. "An employee who contends that he was terminated because he took FMLA leave must show his termination was motivated by discrimination based on that leave." *Marks v. School Dist. of Kansas City*, 941 F. Supp. 886, 892, (W.D. Mo. 1996), *quoting Day v. Excel Corp.*, 1996 WL 29341, at *13 (D. Kan. May 17, 1996). Defendant argues that plaintiff was terminated for violating Article VII, Section 7 of the CBA which prohibits employees from accepting other employment or engaging in business for themselves while on leave of absence and not for taking leave under the FMLA. In response, plaintiff argues that "the FMLA was the vehicle used by defendant to entrap Sepe" and therefore, the causal connection between his termination and his leave has been established. *See* Pltf's Mem. in Opp., 7. Plaintiff has failed to show that his termination was motivated by discrimination based on his FMLA leave. Defendant fired plaintiff for violating the CBA and the General Operating Procedures of the company, not for taking leave because of the birth of his daughter. As stated in the FMLA, leave is authorized "[b]ecause of the birth of a son or daughter . . . and in order to care for such son or daughter." 29 U.S.C. § 2612 (a)(1)(A). Leave is not authorized for the purpose of operating a family member's business. Accordingly, the Court concludes that plaintiff has failed to establish a prima facie case for retaliatory discharge under the FMLA.

> After establishment of a prima facie case, the burden shifts to the employer to offer a legitimate nondiscriminatory reason for its employment decision. If the employer comes forward with a nondiscriminatory reason for its actions, the burden then reverts to the plaintiff to show that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual - -

> i.e., unworthy of belief. Demonstrating pretext gets plaintiff over the hurdle of summary judgment.

Morgan, 108 F. 3d at 1323 (internal citations omitted).

Defendant has satisfied any subsequent burden of producing evidence that plaintiff's termination was for a legitimate, non-discriminatory reason. Consequently, even if plaintiff were to satisfy the causal connection requirement of the prima facie case in this context, the ultimate burden is also his to prove that defendant's proffered non-discriminatory reason is a pretext for discrimination.

In the instant case, defendant has advanced a legitimate non-discriminatory reason for terminating plaintiff. As previously discussed, defendant argues that it did not terminate plaintiff for taking leave pursuant to the FMLA, on the contrary, defendant had permitted plaintiff to take several other periods of leave. Defendant's reason for terminating plaintiff was the violation of a clear provision of the CBA and the GOP of the company. Plaintiff has failed to demonstrate that defendant's proffered reason for termination is pretextual.

> Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proferred legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence . . .

Id. Plaintiff attempts to establish pretext by arguing that a genuine issue of material fact exists as to whether plaintiff violated the collective bargaining agreement. Plaintiff contends that a fact issue exists as to whether plaintiff was "engaged in business for himself" because his wife, Karen Sepe, was the sole

proprietor of the business.[1] Moreover, plaintiff asserts that Article VII, Section 7 of the CBA is ambiguous and to the extent that it does not allow an employee on leave to engage in other employment while employees not on leave are permitted to do so, the CBA violates the FMLA. The issue before the Court is not the proper interpretation of the CBA, the question is whether defendant violated the FMLA when it terminated plaintiff's employment. Plaintiff admitted to engaging in other employment during his usual work hours while he was on FMLA leave. This conduct constitutes a violation of the CBA and company policy and resulted in plaintiff's termination. The reason for his termination did not violate plaintiff's right to care for his daughter during his leave, and therefore did not violate the purpose of the FMLA. In light of the foregoing, defendant is entitled to summary judgment on plaintiff's claims under the FMLA.

The same rationale applies to the analysis espoused in *Diaz*. The inquiry becomes whether plaintiff has established that he is entitled to the benefit he claims under the FMLA. *Diaz*, 131 F. 3d at 713; see also *Hubbard v. Blue Cross Blue Shield*, 1998 WL 171831, at *7 (N.D. Ill. April 10, 1998). The benefit plaintiff claims to have been denied is the right not to be terminated from employment for requesting and taking leave under the FMLA. It is unlawful to discharge or discriminate against an employee for exercising his rights under the FMLA. 29 U.S.C. § 2615. The Court concludes that defendant has demonstrated that plaintiff was not terminated for exercising his rights under the FMLA, but instead was terminated for working in other employment during his leave period in violation of the CBA and company policy. Therefore, defendant is entitled to judgment as a matter of law.

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[1]Plaintiff does not address the fact that the CBA bars accepting other employment as well as engaging in self-employment while on leave and that his work for J&K could readily be viewed as accepting other employment.

In light of the foregoing, defendant is entitled to summary judgment under either the *Diaz* approach or the *McDonnell Douglas* analysis.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment [Doc. #26] is granted.

/s/ illegible
illegible
UNITED STATES

DISTRICT JUDGE

Dated this 29th day of April, 1998.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:97CV470-DJS

Jayson Sepe,
Plaintiff,
v.
McDonnell Douglas Corporation,
Defendants.

JUDGMENT

Pursuant to the order entered herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment is entered in favor of defendant and against plaintiff on all claims asserted in plaintiff's complaint.

/s/ illegible
illegible
UNITED STATES
DISTRICT JUDGE

Dated this 29th day of April, 1998.

The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (*i.e.*, two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 99-635

In The

Supreme Court of the United States

JAYSON SEPE,

Petitioner,

v.

MCDONNELL DOUGLAS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

Petitioner properly listed the Parties in his Petition. Respondent McDonnell Douglas Corporation is a wholly owned subsidiary of The Boeing Company. McDonnell Douglas Corporation does not have any subsidiaries that are not wholly-owned.

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STATEMENT OF THE CASE

Petitioner Jayson Sepe ("Sepe") brought a claim of retaliation against Respondent McDonnell Douglas Corporation ("MDC"), pursuant to the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* Sepe, a union employee, formerly worked at MDC as a builder/mock-up and tooling. MDC discharged Sepe after he admittedly engaged in self-employment during a leave of absence. More specifically, Sepe took a leave of absence from his work at MDC at the time of the birth of his daughter. While on this leave, Sepe worked for his own excavation business during what would have been his normal shift at MDC. The collective bargaining agreement ("CBA"), that dictated the terms and conditions of Sepe's employment with MDC, specifically mandated Sepe's discharge in that circumstance.

Sepe was hired by MDC in April 1984. Sepe's positions with MDC were union positions, and Sepe was a member of the International Association of Machinists and Aerospace Workers, District Lodge 837 ("Machinists" or "Union"). Article VII, Section 7 of the CBA in effect at the time of Sepe's discharge provides as follows:

> An employee accepting other employment or engaged in business for himself while on leave of absence **shall be discharged** by the Company unless the Union and the Company have jointly, prior to the commencement of such leave of absence, agreed in writing that it could be done.

(emphasis supplied). MDC's General Operating Procedures ("GOP") contains similar language prohibiting employment while on leave. In relevant part, Paragraph 3 provides as follows:

> Employees accepting other employment or engaging in self-employment while on authorized leave of absence **will be terminated** by the Company unless written authorization has been granted by the Manager-Employee Records prior to commencement of the LOA

(emphasis supplied).

In May of 1995 Sepe requested and took a 12-week leave of absence for the birth of his daughter. Because of the numerous other leaves of absence he had taken, as well as his otherwise spotty attendance record, Sepe had not worked 1,250 hours in the 12-month period preceding his May 1995 request for leave. In fact, Sepe had worked only 822 hours during the 12-month period preceding his leave. Therefore, he was not entitled to leave under the FMLA, which requires an employee to have worked at least 1,250 hours in the previous 12-month period. 29 U.S.C. § 2611(2)(A).

MDC's own family and medical leave policy, however, was more generous than the FMLA. That is, under the MDC family leave policy in existence at the time, which does not completely mirror the FMLA, Sepe was allowed to take 12 weeks of leave for the birth of his daughter even though he had worked only 822 hours in the previous 12 months. Accordingly, Sepe was granted leave.

MDC learned that Sepe engaged in other work during the leave, a fact which Sepe freely admitted. Sepe also admitted that his supervisor cautioned him to seek approval if he was planning to work during his leave. Sepe ignored this advice and did not seek the written permission (from MDC or the Union) required by the

CBA and GOP that would have allowed him to engage in other work during the leave. Sepe admitted that he worked during other non-FMLA leaves of absence as well. As a result, after investigating the matter, MDC terminated Sepe's employment.

After his discharge, Sepe filed a complaint with the United States Department of Labor ("DOL"), the administrative agency charged with enforcement of the FMLA. The DOL investigated Sepe's claim and found that MDC had not violated the FMLA.[1]

Sepe also filed a grievance pursuant to the terms of the CBA to contest his discharge. At the hearing on his grievance, Sepe admitted that he worked while on leave. MDC denied Sepe's grievance, and, subsequently, the Union withdrew the grievance.

Sepe then filed this lawsuit in the United States District Court for the Eastern District of Missouri. The District Court granted MDC summary judgment. The District Court first found that since Sepe had not worked the requisite 1,250 hours in the 12-month period preceding the May 1995 leave, he was not entitled to protection under the FMLA. In addition, the District Court further

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[1] The FMLA implementing regulations specifically provide that an employer's other policies remain in effect during an FMLA leave, including policies regarding outside employment. *See* 29 C.F.R. § 825.312(h) ("If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave"); *see also* 29 U.S.C. § 26149(a)(3)(B); and 29 C.F.R. § 825.216(a). Accordingly, since Sepe violated MDC's established policy, MDC did not violate the FMLA by terminating his employment.

found that Sepe failed to present any evidence that MDC's stated basis for discharging him was a pretext for FMLA retaliation. Finally, the District Court found that Sepe was discharged, not for taking leave, but for admittedly violating the policy of MDC – and his own Union – by working at another job while on leave without permission.

Sepe filed an appeal with the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"). The Eighth Circuit affirmed the District Court's decision. Although the Eighth Circuit noted that Sepe failed to qualify for leave under the FMLA because he had not worked the requisite hours, it declined to rule specifically upon Sepe's status as an eligible employee. Instead, the Eighth Circuit affirmed the District Court because it agreed that Sepe lacked any evidence that he was discharged from MDC in retaliation for having exercised any FMLA rights:

> Because Sepe worked only 822 hours during the year preceding his request for leave, he does not qualify as an "eligible employee" and therefore is not entitled to FMLA protection . . . .**We need not grapple with the question whether the regulation in question grants rights greater than those conferred by the FMLA, for we agree with the district court that Sepe was fired because he had violated the terms of the CBA and not in retaliation for having exercised any rights under the FMLA**. Sepe does not dispute that he engaged in "other employment" by working at J&K while on leave. Thus, McDonnell Douglas was within its rights – indeed, was required to under the terms of the CBA – to fire

> Sepe after he engaged in such employment without written permission to do so.

(emphasis supplied); Eighth Circuit Decision at 4-5. Accordingly, the Eighth Circuit found that Sepe failed to carry his burden of establishing the third prong of the prima facie case – a causal connection between his exercise of rights and his discharge.

This Court should deny Sepe's petition for a writ of certiorari. The Eighth Circuit and the District Court properly dismissed Sepe's claim. In addition, Sepe's petition does not raise important issues that this Court should address, or otherwise set forth compelling reasons warranting grant of a writ of certiorari. If accepted for review, this case would involve matters relevant and applicable only to the parties in this case. Therefore, Sepe's petition should be denied.

REASONS FOR DENYING PETITION FOR A WRIT OF CERTIORARI

Sepe's petition for a writ of certiorari should be denied because Sepe has not asserted sufficient grounds to justify review by this Court. Supreme Court Rule 10 states that this Court will grant a writ of certiorari "only for compelling reasons," and sets out such circumstances. Sepe's arguments in his petition do not present compelling reasons, and do not otherwise warrant granting him a writ of certiorari.

Sepe seems to argue three grounds in seeking a writ of certiorari: (1) the Eighth Circuit failed to determine whether Sepe established a prima facie case of retaliation

under the FMLA; (2) this Court should review FMLA implementing regulation 29 C.F.R. § 825.110(d); and (3) the Eighth Circuit failed to address the issue of pretext regarding Sepe's retaliation claim. At best, Sepe asserts that the lower courts misapplied rules of law. This Court will "rarely" grant a petition for a writ of certiorari for allegations of misapplication of a properly stated rule of law. S. Ct. R. 10. The circumstances here do not warrant an exception. Accordingly, Sepe's petition should be denied.

1. Sepe's contention that the Eighth Circuit failed to initially find that Sepe established a prima facie case of retaliation under the FMLA is not only an insufficient basis for granting a writ of certiorari, but it is also factually incorrect.

Sepe's contention that the Eighth Circuit failed to find that he had established a prima facie case of retaliation under the FMLA is an insufficient basis for granting a writ of certiorari. Sepe's argument merely disputes the Eighth Circuit's application of the indirect, burden-shifting legal analysis to his retaliation claim, which is an insufficient basis for granting a writ of certiorari. S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").[2]

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[2] The fact that the Eighth Circuit may not have affirmatively stated the appropriate rule of law in its decision is not significant. The District Court set out the rule of law, which decision the Eighth Circuit affirmed.

Moreover, Sepe's contention is wrong. The Eighth Circuit was not required to address specifically the prima facie elements in disposing of Sepe's retaliation claim. An appellate court is not required to regurgitate a lower court's analysis, or rule upon unnecessary issues. *Zotos v. Lindbergh School Dist.*, 121 F.3d 356, 362 (8th Cir. 1997) (appellate court may affirm district court's decision on any basis supported by record); *Ostrzenski v. Seigel*, 177 F.3d 245, 253 (4th Cir. 1999) (holding similarly); *Harper v. Showers*, 174 F.3d 716, 718, n. 3 (5th Cir. 1999) (holding similarly). This rule applies equally before this Court. *Oklahoma v. United States Civil Serv. Com'n*, 330 U.S. 127, 134, n. 3 (1947) ("A respondent can support his judgment on any ground that appears in the record").

The District Court properly applied the indirect, burden-shifting legal analysis to Sepe's retaliation claim. The District Court found that Sepe's claim failed at both the prima facie case stage, and the ultimate stage of presenting evidence of pretext (and intentional retaliation). In its decision, the Eighth Circuit abstained from ruling upon the first element of the prima facie case (eligibility for protection from retaliation) and instead based its decision upon the third prima facie element (Sepe's failure to demonstrate a causal connection between the alleged protected activity and the adverse action).

The Eighth Circuit expressly agreed with the District Court that Sepe failed to demonstrate that he was the victim of retaliation for exercising rights encompassed by the FMLA: " . . . we agree with the district court that Sepe was fired because he had violated the terms of the CBA and not in retaliation for having exercised any rights

under the FMLA." Eighth Circuit Decision at 4. In agreeing with the analysis of the District Court, the Eighth Circuit correctly applied the appropriate legal standard.

2. Sepe's argument that this Court should review FMLA implementing regulation 29 C.F.R. § 825.110(d) is also insufficient grounds for granting him a writ of certiorari. The regulation is not at issue and otherwise is not ripe for review by this Court.

As a bootstrap argument, Sepe also suggests that this Court should grant him a writ of certiorari in order to review 29 C.F.R. § 825.110(d), a regulation implementing the FMLA.[3] According to Sepe, 29 C.F.R. § 825.110(d) operates to expand the coverage of the FMLA even though Sepe does not deny that he failed to work the requisite number of hours necessary to qualify for FMLA leave. This regulation, however, is not at issue in this case, and thus is not properly before this Court.

The Eighth Circuit specifically declined to review 29 C.F.R. § 825.110(d), as well as its application to Sepe's

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[3] 29 C.F.R. § 825.110(d) states, in relevant part: "The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences . . . If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave." Sepe argued unsuccessfully in the District Court that this regulation expands coverage of the FMLA and entitles him to FMLA coverage, thus satisfying the first element of his prima facie case of retaliation.

case: "We need not grapple with the question whether the regulation in question grants rights greater than those conferred by the FMLA . . . " Eighth Circuit Decision at 4. Therefore, the validity of the regulation is not before this Court. *See, e.g., Immigration and Naturalization Serv. v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) ("We also note that, in invalidating the contested regulation, the Court of Appeals relied solely on statutory grounds, and did not reach the plaintiffs' constitutional challenge . . . Accordingly, only the plaintiffs' statutory challenge is before us and we resolve none of the constitutional claims raised by the plaintiffs' initial complaint").[4]

Furthermore, there is no compelling reason for this Court to review the regulation. Contrary to Sepe's implication, there is no conflict among the federal circuit courts of appeal regarding the interpretation and enforceability of 29 C.F.R. § 825.110(d). Indeed, very few decisions have even mentioned 29 C.F.R. § 825.110(d), and in even fewer decisions has the interpretation and enforceability of the regulation been at issue. *See, e.g.,*

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[4] Sepe incorrectly states that the Eighth Circuit found that he was not covered by the FMLA during the relevant time. Sepe's Petition at 4, states: "The Eighth Circuit Court of Appeals decided Sepe was not eligible [for FMLA leave] because the act requires 1250 hours worked in the twelve month period preceding the leave". The Eighth Circuit, as quoted above, specifically did not rely upon the FMLA eligibility issue.

Douglas v. E.G. Baldwin & Assoc., Inc., 150 F.3d 604, 607-08 (6th Cir. 1998); and *Seaman v. Downtown Partnership of Baltimore, Inc.*, 991 F. Supp. 751 (D. Md. 1998). The matter is simply not ripe for this Court's review. *Vasquez v. United States*, 454 U.S. 975, 976 (1981) ("Often the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts").

Further, the lower courts that have reviewed the regulation have ruled similarly, finding that it does not expand the FMLA's coverage. *See Douglas*, 150 F.3d at 607-08 ("If the Court were to exercise jurisdiction where the employer does not meet the statutory prerequisite, it would effectively be expanding the scope of the [FMLA], and the scope of our limited jurisdiction as defined by Congress, by judicial decree . . . This we do not have the power to do"); and *Seaman*, 991 F. Supp. at 754 (in rejecting FMLA claim where employer granted FMLA leave to plaintiff who had not worked the requisite hours to be eligible employee under FMLA, the court stated "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress") (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

In fact, in the lone case relied upon by Sepe in asserting a "conflict" among the courts regarding 29 C.F.R. § 825.110(d) – the *Wolke* decision – the court agreed that only Congress may alter the coverage of the FMLA. *Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133, 1136 (E.D. Va. 1997) ("Congress left no explicit or implicit gap for the [DOL] regulations to fill, and employees should

only receive the protections of the FMLA if they have worked twelve months and the requisite amount of time").[5]

Finally, even if the decision in *Wolke* could reasonably be read to countenance 29 C.F.R. § 825.110(d), the resulting conflict regarding the regulation exists strictly in the district courts. This Court routinely refrains from reviewing issues where a conflict in decisions exists only among district courts. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958) (only "in very rare instances, will a conflict between a decision of the Court of Appeals and that of a district court in some other circuit suffice."). There is no split among the federal appellate courts, and there is no compelling reason to stray from precedent by addressing this issue.

3. Plaintiff's final argument, that the Eighth Circuit failed to address the pretext issue of his retaliation claim, is both an insufficient ground for granting a writ of certiorari, and is factually incorrect.

It is now well-settled that even if Sepe had established a prima facie case of retaliation (and he did not), that doing so would not entitle him to a jury trial, but

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[5] In *Wolke*, the United States District Court for the Eastern District of Virginia merely suggested the potential applicability of an estoppel theory under certain circumstances. That court's later decision in *Barron* completely undermines Sepe's attempt to base his claim on a false conflict with the *Wolke* decision. Indeed, after *Barron*, there is no split even in the Eastern District of Virginia, let alone among federal courts of appeal. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

would merely shift the burden to MDC. To meet its burden at this stage, MDC needs only to articulate a legitimate, nondiscriminatory reason for Sepe's discharge. Sepe has not (and cannot) argue that MDC failed to meet its burden. MDC's legitimate reason for discharging Sepe – that he worked on another job during his leave – is not in dispute. Once MDC meets its burden, Sepe needs to establish both that MDC's offered reason is false and that the true reason Sepe was discharged was in retaliation for taking the FMLA leave.

Sepe incorrectly argues that his petition for a writ of certiorari should be granted because the Eighth Circuit failed to address the issue of pretext regarding his retaliation claim. Petition at 6. ("The result to Sepe is . . . he has been denied the opportunity to show MDC's stated reason for terminating him was pretextual"). As with his first argument, this claim is nothing more than an assertion that the Eighth Circuit misapplied the indirect, burden-shifting legal analysis. Misapplication of the law is not sufficient grounds to grant a writ of certiorari. S. Ct. R. 10.

In addition, Sepe's argument in this regard is factually incorrect. The Eighth Circuit unequivocally found – just as the District Court had – that Sepe failed to demonstrate that his discharge was pretextual:

> We agree with the district court that Sepe was fired because he had violated the terms of the CBA and not in retaliation for having exercised any rights under the FMLA. Sepe does not dispute that he engaged in "other employment" by working at J&K while on leave. Thus, McDonnell Douglas was within its rights – indeed, was

> required to under the terms of the CBA – to fire Sepe after he engaged in such employment without written permission to do so.

Eighth Circuit Decision at 4-5; *see also* District Court Decision at 12-13.[6] As noted by both the District Court and the Eighth Circuit, Sepe **admitted** that he worked during his leave, which was an unequivocal violation of the CBA, and was the basis for Sepe's discharge. Given Sepe's admission, the grounds for his discharge can hardly be pretextual.

In summary, Sepe failed to establish both his prima facie case of retaliatory discharge and his burden to show pretext. Both the United States District Court for the Eastern District of Missouri and the Eighth Circuit properly considered and dismissed his lawsuit. Sepe's petition is but a request that this Court re-examine facts specific to

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[6] As discussed previously, the Eighth Circuit is not required to restate the District Court's analysis, but can merely affirm the District Court's decision, which the Eighth Circuit did here. Plaintiff's attempted reliance upon *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998), evidences the weakness of his argument. *See* Petition at 6, n. 1. In *Hodgens* – just as the Eighth Circuit found in this case with Sepe – the Court of Appeals for the First Circuit affirmed summary judgment for the employer, finding that the plaintiff lacked any evidence that his discharge was a pretext for FMLA retaliation. *Id.* at 169-72. The *Hodgens* case also illustrates the futility of Sepe's contention that he established a prima facie case of retaliation. Although the plaintiff in *Hodgens* established a prima facie case of retaliation, summary judgment for the employer was still warranted due to the lack of evidence of pretext and intentional retaliation (just as in this case), rendering the establishment of the prima facie case effectively moot.

this case, and re-analyze them under well-established, and undisputed, rules of law. The Court should not utilize its limited resources to indulge Sepe under these circumstances, where the Court's efforts will have no impact beyond the parties themselves: " . . . this Court does not sit to satisfy a scholarly interest . . . Nor does it sit for the benefit of the particular litigants." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955); *see also id.* at 79 ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . " (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 [1923]).

Accordingly, the Court should deny Sepe's petition.

CONCLUSION

For each of the reasons set forth in MDC's brief, this Court should deny Sepe's Petition for Writ of Certiorari.

Respectfully submitted,

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